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Supreme Court of the United States

OCTOBER TERM, 1949

No. 148

WATCHTOWER BIBLE AND TRACT SOCIETY, INC.
Petitioner

v.

COUNTY OF LOS ANGELES, CALIFORNIA,
CITY OF LYNWOOD, CALIFORNIA, and
H. L. BYRAM, County Tax Collector,
Los Angeles County, California
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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H. L. BYRAM, County Tax Collector,
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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Hayden C. Covington, on behalf of Watchtower Bible and Tract Society, Inc., seeks the issuance of a writ of certiorari to review the judgment entered in this case on April 29, 1950, by the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Southern District of California, rendered against petitioner.

OPINIONS BELOW

The district court rendered its opinion May 26, 1949. (24-28)[1] It is not reported. The opinion of the court of appeals is not yet reported. It appears in the record. (70-74)

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1950. (75) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the California Revenue and Taxation Code and the ad valorem personal property tax assessed thereunder, as applied to the facts of this case, abridge freedom of press and freedom of worship, contrary to the First Amendment, because they have taxed literature necessary for use in worship by petitioner, a society of missionary evangelists, in door-to-door preaching, such literature being stored for immediate use at the distribution depot of petitioner.

2. Whether the separation of church and state doctrine, implicit in the First Amendment, withdraws from petitioner the protection of the explicit provisions of the First Amendment against abridgment of religion, which in this case is an ad valorem tax upon religious literature.

[1] Figures appearing in parentheses refer to pages of printed transcript of record.

This first question above stated was raised by the same petitioner against the same respondents in the California courts, resulting in an adverse decision. (*Watchtower Bible and Tract Society, Inc.* v. *County of Los Angeles*, 30 Cal. 2d 426, 182 P. 2d 178) This Court refused to review the decision on petition for writ of certiorari with Mr. Justice Murphy dissenting. (332 U. S. 811) The "denial of certiorari by this Court in the earlier case imported no expression of opinion on the merits". *Sunal* v. *Large*, 332 U. S. 174, 181; *House* v. *Mayo*, 324 U. S. 42, 48.

"Nothing is more basic to the functioning of this Court than an understanding that denial of certiorari is occasioned by a variety of reasons which precludes the implication that were the case here the merits would go against the petitioner. Petitions may have been denied because, even though serious constitutional questions were raised, it seemed to at least six members of the Court that the issue was either not ripe enough or too moribund for adjudication; that the question had better await the perspective of time or that time would soon bury the question or, for one reason or another, it was desirable to wait and see; or that the constitutional question was entangled with non-constitutional issues that raised doubt whether the constitutional issue could be effectively isolated; or for various other reasons not relating to the merits. Divergent and contradictory reasons often operate as to the same petition and lead to a common vote of denial. The want of explanations for denials of certiorari is in part due to the fact that a collective reason frequently could not be given." *Darr* v. *Burford*, 70 S. Ct. 587, 602, Mr. Justice Frankfurter, dissenting.

STATUTES INVOLVED

The provisions of the California Revenue and Taxation Code, authorizing the ad valorem tax, here drawn in question, are as follows:

Sec. 106. "Personal property" includes all property except real estate. California Revenue and Taxation Code.

Sec. 201. All property in this State, not exempt under the laws of the United States or of this State, is subject to taxation under this code. California R. and T. Code.

Sec. 401. Except as provided in this part, all taxable property shall be assessed at its full cash value. California R. and T. Code.

Sec. 2151. The board of supervisors shall fix the rate of county and district taxes and shall levy the State, county and district taxes as provided by law. California R. and T. Code.

Sec. 2602: Taxes to be collected. "The tax collector shall collect all property taxes except as otherwise expressly provided."

Sec. 2903: Collection by assessor. The assessor may collect taxes on unsecured property.

CONSTITUTIONAL PROVISIONS INVOLVED

The First and Fourteenth Amendments to the United States Constitution, protecting fundamental freedoms, are relied upon.

STATEMENT

Petitioner is a New York membership corporation formed and operated for the purpose of directing the preaching activity of Jehovah's witnesses and supplying them with literature to carry on door-to-door evangelistic work in California and elsewhere in the United States. (30-31) Petitioner is authorized to do business in the State of

California, having fully complied with the foreign corporation statute of the State. (31)

Petitioner owns and operates a storage depot where Bibles and Bible literature are kept and redistributed by it to ministers of the gospel and evangelists executing the corporate purposes of the society by preaching and carrying on missionary work in California and other states in the western part of the United States. The literature redistributed from said depot to said missionaries and ministers contains information and opinion in the form of printed sermons on Bible subjects, necessary as a substitute for oral sermons in their preaching work publicly and from door to door. (32-34)

None of said literature is sold commercially. It is stored in the redistribution depot in anticipation of redistribution to such ministers, missionaries and evangelists in the field representing petitioner. (35)

In 1947 the assessor for the County of Los Angeles entered the above-described literature, then stored at the depot, on the tax assessment rolls of the County of Los Angeles. (34-35) The tax collector mailed petitioner a tax bill in the amount of $292.85. The taxes were paid under written protest which alleged the unconstitutionality of the statutes and the tax on the ground that they deprived petitioner of its rights of freedom of press and of worship, contrary to the First and Fourteenth Amendments to the United States Constitution. (36-37)

The taxes were not paid voluntarily, but under duress[2], since it was necessary to pay the taxes in order to prevent the sale of the personal and real property belonging to petitioner. (38)

Petitioner filed a complaint in the District Court for

[2] The federal courts have jurisdiction to compel the repayment of taxes paid under duress. Stratton *v.* St. Louis Southwestern Ry. Co., 284 U. S. 530; Ward *v.* Board of County Commissioners, 253 U. S. 17; Muskogee County *v.* United States, 133 F. 2d 61, cert. denied 319 U. S. 745.

the Southern District of California on November 16, 1948. (2-16) The action was brought for the purpose of compelling the repayment of taxes assessed and collected by the respondents and which were paid by petitioner under duress, upon literature stored in petitioner's redistribution depot in Lynwood. The complaint contended that the statute authorizing the taxes and the taxes assessed and collected were void and unconstitutional because abridging petitioner's rights to freedom of press and freedom of worship, contrary to the First and Fourteenth Amendments to the United States Constitution and the Civil Rights Act. (2-16)

Although the jurisdictional amount of Three Thousand Dollars ($3,000.00), exclusive of interest and costs, was not alleged, it was claimed by petitioner that the court nevertheless had jurisdiction to entertain the action for the collection of the taxes in the amount of $292.85 on the ground that the cause of action arose under the Civil Rights Act and that jurisdiction of the district court existed by reason of Title 28, United States Code, Section 1343 (3). (2-3, 14-15)

The cause was heard before the court upon stipulation of fact. (56-61) Exhibits were received into evidence. (48-55) The trial court made specific findings of fact which conformed to the stipulation of the parties. (30-39) The trial court concluded that the jurisdiction of the federal court existed under the Civil Rights Act. (25-26)

The judgment of the trial court was that petitioner take nothing by its suit and that the action be dismissed. (40-41) The judgment of the trial court was duly appealed to the court of appeals. (41-44) Points to be relied upon were duly filed. (63-64) The cause was submitted, following oral argument, on March 23, 1950. (69)

The court of appeals thereafter filed an opinion. (70-74) That court held that petitioner was entitled to claim the rights guaranteed by the First Amendment and that the federal courts had jurisdiction under the Civil Rights Act. (71) The court concluded that because money derived from the ad valorem tax was used to provide police and fire protection for the community where the depot was located the tax differed "from the license fee directly laid on one of Jehovah's Witnesses in *Murdock* v. *Pennsylvania,* 319 U. S. 105, 116", notwithstanding the fact that the license tax in the Murdock case was to pay for "protecting those on the streets and at homes against the abuse of solicitors." (71-72) The court relied on the dictum in the cases of *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Grosjean* v. *American Press Company,* 297 U. S. 233; and *Follett* v. *McCormick,* 321 U. S. 573. (72-73) The court adopted the language of the holding of the Supreme Court of California in *Watchtower Bible and Tract Society* v. *County of Los Angeles,* 30 Cal. 2d 426, 182 P. 2d 178. (73-74) The court of appeals then held that to grant the relief prayed for by petitioner would be unconstitutionally aiding the petitioner to "spread their faith". The court said: "Such aid was held by the Supreme Court in *McCollum* v. *Board of Education,* 333 U. S. 203, 210, to be 'under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in *Everson* v. *Board of Education,* 330 U. S. 1, 15, 16.'" (74)

The court entered a judgment affirming the judgment of the district court dismissing the action. (75)

SPECIFICATION OF ERRORS TO BE URGED

The court of appeals erred

(1) In holding that the decisions of this Court are that an ad valorem tax on literature used by a preacher in preaching is not an unconstitutional burden upon freedom of press and worship, contrary to the First and Fourteenth Amendments.

(2) In holding that the tax defrayed part of the expense of police and fire protection to the depot and literature stored therein, and that such services are not required to be gratuitously supplied to petitioner.

(3) In holding that the separation of church and state doctrine withdrew from the petitioner the protection of the First Amendment because to declare the tax invalid would be to aid one of the "religious groups to spread their faith", contrary to the holding of this Court in *McCollum* v. *Board of Education,* 333 U. S. 203, 210.

(4) In failing to hold that the statutes and the tax abridge freedom of press and of worship, contrary to the First and Fourteenth Amendments.

(5) In failing to reverse the judgment of the district court.

(6) In affirming the judgment of the district court dismissing the action.

REASONS RELIED ON FOR GRANTING THE WRIT

I

It is vital that this Court review this case because the decisions of the courts below imperil the uniform practice throughout the United States of granting religious exemption from taxation. Each of the forty-eight states and the District of Columbia grant exemption to religious organizations from the payment of taxes.

If it is unconstitutional to afford exemption from taxation because such would be aiding a religious group by the state in violation of the separation of church and state doctrine enunciated by the Court in *McCollum* v. *Board of Education,* 333 U. S. 203, 210, as the court below held (74), then hundreds of thousands of churches in this country have suspended over them a sword of Damocles. It never has been thought that the churches were standing on such unstable grounds or that the authors of the Constitution intended to stretch the separation of church and state doctrine that far.

All that is involved here is the ad valorem tax upon personal property. It is true that every church of the country will not be greatly burdened by a tax on such literature as may be found in the churches. But the fact remains that the doctrine of separation of church and state as interpreted by the court below precludes the states from exempting in their constitutions religious organizations from real estate taxes. This is the result of the decision below when it is logically extended.

Not only are the legislative and constitutional policy of all the states and the District of Columbia imperiled by the doctrine of the decision below but also the welfare of all the churches is affected and imperiled. Should the prin-

ciple announced by the court below be allowed to stand, it will give rise to further discriminations and denials. The principle announced below in effect repeals completely the constitutional provisions of all of the states and the Act of Congress exempting religious organizations in the District of Columbia from taxation.

The holding of the court below that the doctrine of separation of church and state precludes petitioner from claiming benefits of the First Amendment against abridgment by taxation produces an anomaly, an inconsistency and an ambiguity that affects indirectly now and ultimately directly the rights and liberties of all of the religious organizations in the United States and the people who attend, belong to or support such organizations.

The construction placed on the First Amendment so as to preclude a religious organization from claiming the benefits of the First Amendment in this case is inconsistent and creates an ambiguity that ought to be removed. This Court ought to review this case and decide once and for all whether a religious organization can be precluded from protection of the First Amendment from taxation which is claimed to abridge freedom of press and worship.

The issue of whether the state can tax religious literature used by a preacher as a part of his worship is a presently existing controversy. The perspective of time will not terminate the problem. It continues to arise and will undoubtedly increase in other parts of the country and in many of the other communities in California. The case is therefore important beyond the particular facts and parties to this litigation. The practical effect of the decision below is very extensive and justifies this Court in reviewing the case and deciding the issues involved.

II

The decisions below are in conflict with *Richfield Oil Corporation* v. *State Board of Equalization,* 329 U. S. 69. In that case it was held that the identical ad valorem personal property tax of California was invalid when applied to personal property stored on the West Coast in anticipation of shipment in foreign commerce. The decision below is in direct conflict with that holding because things used which are necessary to the enjoyment of the rights guaranteed by the First Amendment are as strongly protected from taxation as are things that move in foreign commerce protected against taxation by the "import-export clause" of the Constitution. Therefore the ad valorem personal property tax assessed against the literature in this case is as invalid as was declared to be the ad valorem tax assessed against the oil stored. This Court held:

"Article I, Section 10, Clause 2 of the Constitution provides that 'No State shall without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, . . .' [¶] . . . It is suggested, however, that the history of the Import-Export Clause shows that it was designed to prevent discriminatory taxes and not to preclude the levy of general taxes applicable alike to all goods. . . . The qualified interpretation urged upon us has therefore no substantial support in the history of the Import-Export Clause. . . . [¶] . . . We cannot, therefore, read the prohibition against 'any' tax on exports as containing an implied qualification. . . . [¶] The prohibition contained in the Import-Export Clause against taxation on exports clearly involves more than a mere exemption from taxes laid specifically upon the exported goods themselves. That is true of the constitutional prohibition against federal taxes on exports. . . . [¶] We conclude that the tax which California has exacted from appellant is an impost upon an export within the meaning of Article I, Section 10, Clause 2, and is therefore unconstitutional." 329 U. S. 69, 74, 76, 78, 82-83, 85, 86.

The action of the court below in sustaining the ad valorem tax because it was a uniform tax generally applicable to all alike, is, consequently, squarely opposed to the ruling of this Court in *Richfield Oil Corporation* v. *State Board of Equalization,* 329 U. S. 69.

III

The decisions below fail to give effect to applicable decisions of this Court holding the license tax and other taxes unconstitutional when applied to the distribution of literature, where the taxes were calculated on a uniform income or valuation basis. *Grosjean* v. *American Press Company,* 297 U. S. 233; *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Follett* v. *Town of McCormick,* 321 U. S. 573.

The court below refers to certain dicta in these dicisions claiming that this Court has said that a direct tax upon literature is permissible and its not a violation of the First Amendment. This Court has not so held. It is respectfully submitted that the court below misinterpreted the dictum appearing in *Murdock* v. *Pennsylvania,* 319 U. S. 105, at pages 112, 116, and *Follett* v. *Town of McCormick,* 321 U. S. 573, at page 577.

The court below also relied on the dictum appearing in *Grosjean* v. *American Press Company,* 297 U. S. 233, where this Court said at page 250: "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press." (73)

It is submitted that the court below misinterpreted the dictum from these decisions by the Court. When it was said by the Court that one engaged in the exercise of freedoms of speech, press and worship was liable for the pay-

ment of taxes on property, certainly the Court did not mean to say that such taxes could be imposed on *all* property, even property necessary to worship.

The basic fallacy of the decision of the court below is that since the literature is "property", it is not protected by the guarantees of freedom of press and worship. In this respect the conclusion reached is factitious. Through syllogism, beginning with false premises, the court below has reached a conclusion that removes literature entirely from the protection of freedom of the press and worship. Thus the hand of the clock has been turned back centuries to the time when literature was banned and taxed because of the novelty thereof. In that day the rulers were unable to recognize literature as a necessary, basic part of the fundamental freedoms of the people. The ghost phrase that 'personal property is not exempt from taxation' has been used to obscure the real vice of the taxes imposed against freedom of press and worship in this case.

The mere fact that literature is personal property does not withdraw it from the protecting shield of the Bill of Rights. The broad and general terms of the Bill of Rights, protecting freedom of speech, press and worship, are flexible. They protect any device which is necessary and directly used in order to properly exercise the rights guaranteed in the fundamental compact.

The prohibition against abridgment by taxation of the rights of freedom of speech, freedom of press and freedom of worship is not limited to privilege taxes and license taxes. It extends to all kinds of taxes that directly burden the exercise of the right when imposed. "No one could doubt that taxation which may be freely laid upon activities not within the protection of the Bill of Rights could—when applied to the dissemination of ideas—be made the ready instrument for destruction of that right. . . .

"The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discrim-

inatory attempts to wipe them out. On the contrary the Constitution, by virtue of the First and Fourteenth Amendments, has put those freedoms in a preferred position. Their commands are not restricted to cases where the protected privilege is sought out for attack. They extend at least to every form of taxation which, because it is a condition of the exercise of the privilege, is capable of being used to control or suppress it. . . .

". . . The First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws or all except tax laws. It is true that the constitutional guaranties of freedom of press and religion, like the commerce clause, make no distinction between fixed-sum taxes and other kinds. But that fact affords no excuse to courts, whose duty it is to enforce those guaranties, to close their eyes to the characteristics of a tax which render it destructive of freedom of press and religion." *Jones* v. *Opelika,* 316 U. S. 584, 608, 609-610, Mr. Chief Justice Stone, dissenting. This dissenting opinion was made the basis of the decision vacating the judgment resulting from the majority opinion and ordering the judgment of the state courts reversed. *Jones* v. *Opelika,* 319 U. S. 103, 104.

The appellation of the Supreme Court of California, in *Watchtower Bible and Tract Society, Inc.* v. *County of Los Angeles,* 30 Cal. 2d 426, 182 P. 2d 178, followed by the court below, that the literature is mere "property" should not blind this Court and cause it not to see the real issue presented here. It is restraint and abridgment of the freedom that is prohibited by the First Amendment irrespective of the name that may be given the thing that claims the protection or the characterization placed upon the instrument of worship. "The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name." *Cummings* v. *Missouri,* 4 Wall. 277, 325.

In *Associated Press* v. *N. L. R. B.,* 301 U. S. 103, 132, it is said that "The publisher of a newspaper . . . like others

. . . must pay equitable and non-discriminatory taxes on his business." The courts of the state of California and the court below simulated the circumstances in the instant case to the facts in the case of *Giragi* v. *Moore,* 301 U. S. 670, and *Arizona Publishing Co.* v. *O'Neil,* 304 U. S. 543. The decisions in both those cases are not in point and do not sustain the decision of the California Supreme Court or the court below. However, in event it is found that the decisions in the *Giragi* and *Arizona Publishing Company* cases are applicable, then petitioner says that this Court should and may reconsider and clarify the effect of its decision in *Giragi* v. *Moore.*

In that case the State of Arizona levied a tax of one per cent upon the gross receipts of various businesses in the state, including the newspaper publishing business, and required every person engaged in a business subject to such tax to obtain a license or else suffer fines and penalties.

An examination of the record in the *Giragi* case will show that the contention that the tax there involved was in violation of the Fourteenth Amendment was first raised on motion for rehearing before the Supreme Court of Arizona. Until that motion for rehearing no federal question had been raised. Consequently, when the record came before the Court on appeal, it was deficient in failing adequately to show in what respects the tax constituted a restraint upon the press.

This Court therefore dismissed the appeal in a per curiam decision for want of a substantial federal question. *Giragi* v. *Moore,* 301 U. S. 670. But the matter was disposed of on a jurisdictional statement only and the per curiam decision was not accompanied by an opinion explaining the relation of *Grosjean* v. *American Press Co.,* 297 U. S. 233, and *Associated Press* v. *N. L. R. B.,* 301 U. S. 103, to the issue involved. Petitioner believes, therefore, that the true character and effect of a tax such as that in the *Giragi* case has never been fully considered by the Court.

Nor was the true character and effect of the tax fully considered in *Arizona Publishing Co.* v. *O'Neil,* 304 U. S. 543, where this Court on appeal affirmed the judgment of the District Court of the United States for the District of Arizona upholding the same tax statute as in the *Giragi* case. This case was also decided on the jurisdictional statement and in a per curiam decision which needs clarification.

Since the *Giragi* and *Arizona Publishing Company* decisions this Court made it plain in *Lovell* v. *Griffin,* 303 U. S. 444, that the First Amendment safeguards liberty of circulation as well as liberty of publication. Petitioner believes that in the light of the *Lovell* and subsequent cases the statute in the Arizona cases was as clear a violation of the freedom of the press as is the tax in the present case.

Those engaged in "press activity", such as the newspapers and other publishers, are not exempt from ordinary forms of taxation. They are required to pay various types of taxes, federal and state, including net income taxes, capital stock taxes, social security taxes, corporate franchise taxes, real and unemployment compensation taxes. All these are the ordinary forms of taxation. But because the public press can be required to pay ordinary forms of taxation, one could not successfully contend that such newspapers and publishers could be required to pay a tax upon the distribution of their literature or the printing thereof.

Storage of the literature in question while en route from headquarters of petitioner to its missionary evangelists in various parts of California is a necessary step in the process of preaching the gospel of God's kingdom. The message as preached by Jehovah's witnesses may be likened unto a flowing stream of ideas conveyed in words on printed pages issuing constantly from presses of petitioner, and which flows to people of good-will who desire to receive the literature in millions of homes of the nation, including California.

The taxing of any step in the process of printing, pub-

lishing and distributing literature is an unconstitutional abridgment of freedom of the press. *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Follett* v. *McCormick*, 321 U. S. 573; *Vermont* v. *Greaves*, 112 Vt. 222, 22 A. 2d 497; *McConkey* v. *Fredericksburg*, 179 Va. 556, 19 S. E. 2d 682.

Freedom of the press is not confined to the mere printing of literature. It embraces also circulation. "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." Ex parte *Jackson*, 96 U. S. 727, 733; see also *Lovell* v. *Griffin*, 303 U. S. 444, 452.

Storage of the literature at the Lynwood depot by petitioner is as much as any other act a part of the process of circulation. It is as much a part of the circulation process as is the handing of a piece of literature by one of the missionary evangelists to a person as the evangelist moves from door to door in his assigned territory. Without a place to store literature the liberty of printing and distributing it would be of little, if any, value. The distributor of literature cannot carry with him on his person all of the literature which he uses in his preaching business. Of necessity he must keep an operating reserve in large quantities at some place, to be drawn upon from time to time in his process of distributing literature from door to door.

Undoubtedly the imposition of a tax against the storage of literature by the individual missionary evangelist would be an unlawful abridgment of freedom of speech, press and worship, contrary to the named constitutions. Certainly a state could not tax the literature reserve that a missionary evangelist might keep in his automobile used by him in the servicing of his missionary field. The state could not tax the literature which a missionary evangelist might have stored at his home or in his garage or in a private storage place rented by him.

Since the state concededly cannot tax the literature

stored by the individual missionary evangelist, then *a fortiori,* the state cannot lawfully tax the literature stored by two or more missionary evangelists working together and jointly. If the state cannot tax the stored literature of one evangelist, or of two, three or more missionary evangelists operating jointly, then, by force of the same reason, the state cannot lawfully impose a tax upon literature stored by a society of missionary evangelists, which literature is commonly used by the large group or society of missionary evangelists in their joint action of preaching.

Storage of literature at the Lynwood depot by petitioner is a mere convenience, essential to effective distribution of the literature. It is true that the literature could be shipped directly from the society's headquarters at New York to the individual missionary evangelists in their respective territories. However, that is not necessary because it imposes upon the society an unnecessary financial burden. It makes more costly, hence burdensome, the distribution of the literature by the missionary evangelists.

Storage of literature for redistribution to evangelists for final delivery to the people of California is as necessary a step in the process of petitioner's publishing as is the stevedoring step in the process of shipping in foreign commerce. Accordingly it should have the same exemption from taxation.

The entire flowing stream of publication must be kept open, pursuant to the mandate of the Bill of Rights and the Constitution of the United States. The protecting shield of the Bill of Rights in the Constitution extends from that stream's source to its termination, which is the delivery of the literature to the millions of recipients thereof throughout the nation, including California. The Bill of Rights in the Constitution forbids the state's erecting a dam or barrier at any point along the flowing stream of publication, which begins with printing and ends with delivery of such litera-

ture to persons of good-will at their homes or publicly upon the streets of the nation.

Publication, as a stream aflow, is kept alive by the continuing and uninterrupted gliding of literature from the printing presses to the people. If at any point the stream is dammed, it will stagnate, resulting in disease and death to the vital freedom as well as to those entitled to enjoy it.

Certainly none would have the audacity to argue that the storage of literature is not a part of the process of publishing. Can any say that the storage of literature is not a step or vital essential of the publishing process viewed as a whole and which, streamlike, must course smoothly and continuously from the printing presses to the people? The people cannot be required to stand at the printing press. Liberty of press does not end at the printing press. The people have the right to receive the literature at their homes and upon the streets of the nation. How can they receive it if they cannot have someone to deliver it to them? How can the deliverer of the literature effectively distribute it unless he has an abundance of literature to distribute? How can he have an abundance of literature to distribute unless he has a place to store it?

The mere uttering of all these questions against the sounding-board of reason reverberates the answer that storage of literature is a vitally essential part of the process of circulation of literature. Since circulation cannot be burdened by taxation, no part of the process of circulation can be impeded or stagnated by taxation.

In an analagous situation of commerce, this Court has held that the business of stevedoring, loading and unloading ships was such a vitally necessary step in the process of foreign trade that it could not be taxed by the state. *Joseph* v. *Carter & Weekes Stevedoring Company,* 330 U. S. 422, 426, 427-428. In that case the Court said: "The movement of cargo off and on the ship is substantially a continuation of the transportation. . . . The transportation in com-

merce, at the least, begins with loading and ends with unloading. Loading and unloading has effect on transportation outside the taxing state because those activities are not only preliminary to but are an essential part of the safety and convenience of the transportation itself."

Also reference is made to the dissent of Mr. Justice Douglas in that case at 330 U. S. 445. There he said: "Loading and unloading are a part of 'the exporting process' which the Import-Export Clause protects from state taxation. See *Thames & Mersey Ins. Co.* v. *United States,* 237 U. S. 19, 27. Activity which is a 'step in exportation' has that immunity. . . . And the gross receipts tax is an impost on an export within the meaning of the Clause, since the incident 'which gave rise to the accrual of the tax was a step in the export process.' *Richfield Oil Corp.* v. *State Board, supra.* [329 U. S. 69]"

There is no analogy between the long line of decisions which approve the imposition of taxes upon rolling stock of railroads and airplanes of air lines engaged in interstate commerce and the imposition of a tax against the property in this case. These vehicles of transportation are clearly subject to taxation. Certainly petitioner does not argue that the automobiles used by its missionary evangelists are exempt from the ad valorem property tax of California or the payment of automobile license tax fee required in the registration of automobiles.

The literature used in preaching the gospel of God's kingdom by Jehovah's witnesses is protected from taxation by the First Amendment. The automobile is not. It is not necessary. The literature is necessary. It is the article that gives life to the press activity protected by the Bill of Rights. It is a product and result of freedom of the press.

Certainly, it would be conceded that goods shipped in commerce are free from taxes while in transit over interstate commerce lines. The literature protected by the Bill of

Rights against taxation is as free from the ad valorem taxes as are goods in interstate transit.

The principle announced in the case of *Nippert* v. *City of Richmond*, 327 U. S. 416, applies here rather than the principle of the rolling stock cases. In that case Mr. Justice Rutledge said: "If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subject to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the states and necessarily involves 'incidents' occurring within each state through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local', and thus achieve its desired result. . . .

"It is no answer, as appellee contends, that the tax is neither prohibitive nor discriminatory on the face of the ordinance; or that it applies to all local distributors doing business as appellant has done. Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern. . . .

". . . With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against. . . .

"The drummer is a figure representative of a by-gone day. But his modern prototype persists under more euphonious

appellations. So endure the basic reasons which brought about his protection from the kind of local favoritism the facts of this case typify." *Nippert* v. *City of Richmond,* 327 U. S. 416, 423, 431, 434, 435.

Taxation of literature is as much an abridgment of freedom of press and worship as is prohibition or censorship. *Murdock* v. *Pennsylvania,* 319 U. S. 105. All forms of burdens which may be used as instruments of destruction or as impediments to the free exercise of civil liberties by the people were contemplated by the authors of the First Amendment as within the ambit of the Amendment.

Every school child knows that the forefathers fought valiantly until they cast off and out from this land taxation of freedom as the favorite yoke of oppression. That method of abuse and prohibition of the freedom of the press was without question of doubt more clear in the minds of the framers of the First Amendment than any other sort of encroachment.

"The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times." Murphy, J., in *Thornhill* v. *Alabama,* 310 U. S. 88. See, also, Duniway, *The Development of Freedom of the Press in Massachusetts,* p. 123 et seq.; Tyler, *Literary History of the American Revolution;* 2 Bancroft, *History of the United States,* p. 261; Schofield, *Freedom of the Press in the United States* (1914), 9 Proc. Am. Social, Sec. 67, 76, 80.

At the time of the American Revolution that was the favorite and best known means of oppression. For historical discussion of these oppressive taxes, see *Grosjean* v. *American Press Co.,* 297 U. S. 233; *Near* v. *Minnesota,* 283 U. S. 697, 707-716. See, also, W. G. Bleyer, *The History of American Journalism,* 1927 ed., 1129; G. J. Patterson, *Free Speech and a Free Press,* 1939 ed.; W. M. Clyde, *The Struggle for*

the Freedom of the Press from Caxton to Cromwell, 1934 ed.; C. D. Collet, *History of Taxes on Knowledge,* 1899 ed.; Ford, *Pamphlets on the Constitution of the United States,* 1787-1788, pp. 113, 156-157, 316 (1888); *Pennsylvania and the Federal Constitution* (McMaster and Stone, Eds.), pp. 180, 181, 576 ff. (1888); Stevens, *Sources of the Constitution of the United States,* pp. 213, 218, 221 (1894); Stewart, *Lennox and the Taxes on Knowledge,* 15 Scottish Hist. Rev. 322, 326.

The term "abridge" as used from the First Amendment means "to shorten, curtail or reduce" and comes from the same root word as "abbreviate". It does not mean "destroy, forbid, prohibit, prevent."

It cannot be contended that the tax here is not an "abridgment" of civil liberties within the prohibition of the First Amendment. The tax is more pernicious than even the ancient stamp tax because it is an arbitrary tax providing for an amount which must be paid for keeping in one's possession literature, and does not depend upon income or profit of the individual. It does not make allowance for those engaged in charitable activity where most of the items are delivered free of charge. No provision is made for any reduction in amount of tax on account of the number of pieces given away free of charge. The tax is therefore the worst kind of burden or abridgment.

In *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819), it is said: "The power to tax is the power to destroy." That destruction is a grim and appalling reality in the instant case.

This entire question of whether the tax is an unconstitutional "abridgment" of the rights guaranteed by the Bill of Rights can be disposed of on that single, lone milestone of constitutional law and judicial history.

The universal rule of the courts is that when a tax is found to be proper and constitutional upon a given activity such tax cannot be attacked as a "substantial clog" or excessive. Once it is decided that a tax can be imposed upon the right to print, publish, store, circulate or distribute printed matter or to preach the gospel as did Christ Jesus and His apostles, then there is no limit to this power of taxation and complete control, suppression, and prohibition. Destruction of the four freedoms can readily result.

The courts have repeatedly pointed out that when a subject matter is brought under the taxing power of the federal, state or municipal government, the amount—regardless of how destructive or prohibitive it may be—cannot be questioned by the judiciary. There is no limit to its exercise within the discretion of the government, state or city. The oppressiveness of the burden cannot interdict the taxation. *Magnano Co.* v. *Hamilton,* 292 U. S. 40; *Stewart Dry Goods Co.* v. *Lewis,* 294 U. S. 550.

In *Veazie Bank* v. *Fenno,* 8 Wall. 533, 548, the validity of an increase in the tax on the circulating notes of persons and state banks was questioned. The Court refused to consider the question of whether the increase was excessive and said: "The first answer to this is that the judiciary cannot prescribe to the legislative departments of the government limitations upon its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution." See also *Bailey* v. *Drexel* ("Child Labor Tax Case"), 259 U. S. 20, 41; *McCray* v. *United States,* 195 U. S. 27; *Spencer* v. *Merchant,* 125 U. S. 345; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107.

IV

The decisions below fail to give proper effect to the decisions of this Court in *McCollum* v. *Board of Education,* 333 U. S. 203 and *Everson* v. *Board of Education,* 330 U. S. 1. The court below misinterpreted the holdings of this Court in these two cases. The court below held that the effect of these decisions was to preclude the court below from allowing petitioner, a religious corporation, to use the shield of the First Amendment which protects freedom of religion against abridgment on the ground that to declare the tax invalid would amount to a state subsidy to "religious groups to spread their faith," which is put " 'under the ban of the First Amendment (made applicable to the States by the Fourteenth Amendment) as we interpreted it in *Everson* v. *Board of Education,* 330 U. S. 1, 15, 16.' " (74)

The holding of the court below in this respect is out of harmony with the holding of this Court in *Murdock* v. *Pennsylvania,* 319 U. S. 105, and *Follett* v. *Town of McCormick,* 321 U. S. 573. In those cases freedom of religion was relied upon to declare the tax invalid. The tax in those cases was not a discriminatory tax. In fact in those cases the Court found that the taxes were uniform and applicable to all alike.

If the shield of the First Amendment is to be withdrawn from a religious organization when ad valorem taxes are involved then by force of the same reason the same shield must be withdrawn when license taxes are attacked.

Surely this Court did not ignore history and disregard the intent of the framers of the First Amendment when it held that Jehovah's witnesses were entitled to the protection of the freedom of religion clause in the First Amendment against taxes in the *Murdock* and *Follett* cases. If the First Amendment is available to protect a religious organization against license taxes, *a fortiori* it is available

to protect a religious organization against unlawful ad valorem taxes assessed unconstitutionally against literature used as a necessary part of preaching the good news of God's kingdom as the only hope for mankind.

The wall of separation of church and state certainly does not extend so far as to deny a religious organization the right to use the First Amendment when taxes are involved. Certainly the framers of the First Amendment did not mean to say, as the court below held, that religious organizations are protected under the First Amendment against all sorts of abridgments save and except taxation. If protection of religious organizations against abridgment by taxation was not intended by the framers, they would have written into the First Amendment that religious organizations are free from all burdens and abridgments in the exercise of their religious freedom save and except taxation. Since this proviso was not written into the First Amendment we must assume that all types of abridgments, taxation included, were and are forbidden by the First Amendment.

The discordant doctrine that the First Amendment does not protect a religious organization against abridgment by taxation of the exercise of liberties guaranteed by the First Amendment alone ought to be sufficient to lead this Court to grant certiorari and review the case. The same reasons that led the Court to review *McCollum* v. *Board of Education,* 333 U. S. 203, and *Everson* v. *Board of Education,* 330 U. S. 1, should persuade this Court to grant review here. Certainly the petitioner ought not to be required to submit to the payment of the taxes impinging, as they do, the rights guaranteed by the First Amendment, until this Court has reviewed the case and decided the questions presented here.

CONCLUSION

For the reasons above this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated, June 24, 1950

No. 148

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CHARLES ELMORE CROP
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IN THE

SUPREME COURT

OF THE

United States

WATCHTOWER BIBLE AND TRACT SOCIETY, Inc.,

Petitioner,

vs.

COUNTY OF LOS ANGELES, CALIFORNIA, CITY OF LYNWOOD, CALIFORNIA, and H. L. BYRAM, County Tax Collector, Los Angeles County, California,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HAROLD W. KENNEDY,
County Counsel,
and
Gordon Boller,
Deputy County Counsel,
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WESTERN PRINTING COMPANY, WHITTIER

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The petition correctly refers to the Opinions below. (Pet. p. 2.) The opinion of the Circuit Court of Appeals, however, appears not only in the transcript of record. It is reported as well in 181 Fed. (2) 739.

Jurisdiction

The petition correctly recites the date of the judgment of the Circuit Court of Appeals and the statutes invoked as affording jurisdiction for the writ.

We argued below a want of Federal jurisdiction. The Circuit Court of Appeals concluded that jurisdiction existed. We submit again, however, the argument against jurisdiction.

This case was not, as recited by Paragraph I of the complaint, within the jurisdiction of the District Court under the cited Civil Rights Act of 1871 and the Judicial Code, Title 28, 41 (14), nor under the new Title 28, United States Code, sec. 1331 or section 1343 (3).

This action is purely an action under California statute authorizing suit for the recovery of taxes paid under protest. (Rev. & Tax. Code of California, sections 5136-5142.) It is not, within the provisions of said Federal statutes nor, thereunder, an action "to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States . . ." The District Court did not gain jurisdiction because of asserted invalidity of tax predicated upon alleged infringement of Constitutional guaranties in the Bill of Rights. (*Carter v. Greenhow,* 114 U. S. 317, 29 L. Ed. 202.)

In that case Virginia State bonds had been issued under a statute which declared the coupons thereon legal tender in payment of taxes. Thereafter statute provided that taxes should be payable only in legal tender of the United States. Plaintiff tendered coupons from bonds acquired prior to the statute in payment of his taxes. The Tax Collector rejected the tender and

distrained on plaintiff's property to realize the tax. Plaintiff sued in trespass. Held that the statute impaired the contract in the bonds and violated the contract clause of the Constitution, but that the matter was not within the jurisdiction of the Federal Court until after relief had been sought and refused by the state court; and the Federal remedy was only by review of the state court decision.

This point of the want of jurisdiction in the District Court constitutes, of course, an additional ground for support of the judgment for defendants.

Statutory and Constitutional Provisions Involved

The petition quotes the provisions of State law which were cited by the Circuit Court of Appeals. (Pet. p. 4.) In addition should be noticed the provisions of the Constitution and statutes granting and controlling exemption of property used for religious worship, which the petition asserts are nullified by the decision herein.

Art. XIII, sec. 1, Constitution:

> "All property in the State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and

things, real, personal, and mixed, capable of private ownership; . . ."

Art. XIII, sec. 1½, Constitution:

"All buildings, and so much of the real property on which they are situated as may be required for the convenient use and occupation of said buildings, when the same are used solely and exclusively for religious worship shall be free from taxation; provided that no building so used which may be rented for religious purposes and rent received by the owner thereof, shall be exempt from taxation."

Sec. 254, R. & T. Code:

"Any person claiming the church, orphanage, college, exhibition, or welfare exemption shall make a return of the property to the assessor annually, the same as property is listed for taxation, and shall accompany it by an affidavit, giving any information required by the board."

Sec. 256, R. & T. Code:

"Church exemption affidavit. The affidavit for church exemption shall show that:

(a) The building is used solely for religious worship.

(b) The described portion of the real property claimed as exempt is required for the convenient use of the building.

(c) It is not rented for religious purposes and rent received by the owner."

Sec. 260, R. & T. Code:

> "If any person, claiming any exemption named in this article, fails to follow the required procedure, the exemption is waived by the person."

Statement of the Case

The facts in the case are recited in the decision of the Circuit Court of Appeals, as alleged in the complaint, to wit:

> " . . . that appellant is a New York Corporation used exclusively by Jehovah's Witnesses, a religious organization, in spreading its religious doctrines. The corporation maintains a warehouse in the City of Lynwood, County of Los Angeles, which it uses as a storage place for religious books, pamphlets, etc., dealing with the religious doctrines of Jehovah's Witnesses. From this warehouse it distributes literature to its evangelists, missionaries and ministers. This literature was assessed as personal property subject to the California personal property tax." (Tr. of Rec. p. 71.)

Questions Presented

The statement by the petition of the questions presented is in the main adequate and correct. It is, however, subject to correction in two particulars.

(1) The statement of the questions presented omits the question of the jurisdiction of the Court; and

(2) The question presented is as to asserted abridgement of the freedom of worship. The statement represents that the case involves as well question of abridgement of the freedom of the press.

The questions presented herein are: (1) as to the federal jurisdiction and (2) as to the validity of the tax and of the state statute providing therefor, as applied without discrimination to petitioner's printed matter and religious literature in storage, as against the contention that such tax and such application of the tax statute violated the provision of the First Amendment assuring freedom of worship.

The petition submits its statement of the questions presented under numbers 1 and 2. (Pet. p. 2.) Under "1" the petition includes with the question of violation of freedom of worship a second question of asserted violation of the freedom of the press. (The question of freedom of the press, we submit, is not, indeed, herein presented). Under "2" the petition assumes that petitiner's printed matter and religious literature was nontaxable as within "the protection of the explicit provision of the First Amendment against abridgement of religion," (Pet. p. 2) and the petition asserts that the question is presented whether a so-called "separation of church and state doctrine" withdraws from petitioner such assumed "protection" from taxation. (The petition cannot thus beg the question whether its property is non-taxable under the First amendment. The Circuit Court of Appeals held, as before did the

District Court, that the tax did not infringe such freedom.)

No present constitutional question is herein involved.

The petition for certiorari should be denied. It raises no present constitutional question. The petition does purport to state a constitutional question. In truth, however, no constitutional question is involved. Actually the only possible constitutional questions have been settled. The decisions of this high court have already resolved them and against petitioner's contentions.

As the petition frankly concedes, petitioner has once before failed to support the very contentions now made before this Court. This Court has already denied petition for certiorari to review the determination of the California Supreme Court thereon in a case by Watchtower Bible and Tract Society against these same defendants, 30 Cal. (2) 426. Petition for certiorari denied by this Court, 332 U. S. 811.

Specification of Errors to Be Urged

The petition charges that "the Court of Appeals erred" in six stated particulars. (Pet. p. 8) Specifications 1, 2, 4, 5 and 6 charge that denial of tax exemption and sustaining the judgment of the District Court violated the provision of the First Amendment assuring freedom of press and of worship.

Specification 3 misconceives the decision of the Court of Appeals and charges error therein, to wit:

> "(3) In holding that the separation of church and state doctrine withdrew from the petitioner the protection of the First Amendment because to declare the tax invalid would be to aid one of the 'religious groups to spread their faith', contrary to the holding of this Court in *McCollum v. Board of Education,* 333 U. S. 203, 210." (Pet. p. 8) (And similarly, ib. p. 25.)

Reasons Urged for Granting the Writ

The petition makes no summary or even precise statement of the reasons it urges for granting the writ. Under the above heading, however, the petition sets up under Roman numerals four divisions.

In division I, the petition asserts that

> ". . . the decisions of the courts below imperil the uniform practice throughout the United States of granting religious exemption from taxation." . . . (Pet. p. 9.)

In division II, the petition asserts that:

> ". . . things used which are necessary to the enjoyment of the rights guaranteed by the First Amendment are as strongly protected from taxation as are things that move in foreign commerce protected against taxation by the 'import-export clause' of the Constitution. . . ." (Pet. p. 11.)

In division III, the petition asserts that:

> "the decisions below fail to give effect to applicable decisions of this court holding the license tax and other taxes unconstitutional when applied to the distribution of literature. . . ." (Pet. p. 12.)

In division IV, the petition asserts, in repetition of its misconceived third "specification of error to be urged," (Pet. p. 8), that the Court of Appeals erred in denying tax exemption to petitioner's property on the alleged ground that tax exemption amounted to a state subsidy to one religious group to spread their faith.

This Case Involves the Question of Asserted Abridgement of the Freedom of Worship. It Does Not Involve as Well Any Question of Asserted Abridgement of the Freedom of the Press.

The question herein presented is as to the validity of the provision of the California Constitution and statutes as they authorize and require taxation of all taxable property including Watchtower's pamphlets, books and other printed matter and stationery supplies in storage in the City of Lynwood and question whether such provisions of Constitution and statutes or the taxes levied thereunder upon said property were void and unconstitutional as abridging the *freedom of worship.* The case does not involve, as well, question of asserted abridgement of the *freedom of the press.*

The findings by the trial court quoted the grounds of objection in the written protest which accompanied appellant's tax payment and declared precisely that the controversy between plaintiff and defendants was as to whether the taxes constituted "an abridgement of the provisions of the California and Federal Constitutions guaranteeing freedom of worship." (Rec. 38-39.)

Petitioner, however, seems to attempt in its petition, as before upon the appeal to the Circuit Court, to broaden the question beyond that raised by the complaint and considered and determined by the trial court. Points 2 and 3 of purported "Points to be Relied upon" (ib. p. 63) state beyond the question authorized by the protest and the complaint (the question of asserted abridgement of freedom of worship) a further and unauthorized question (the question of asserted abridgement of the freedom of the press). (Ib. 64.)

The petition too states as the first question presented,

> "whether the California Revenue and Taxation Code and the ad valorem personal property tax assessed thereunder, as applied to the facts of this case abridge freedom of press and freedom of worship contrary to the First Amendment?" (Pet. p. 2.)

The petitioner further asserts that "the complaint contended that the statute authorizing the taxes and the taxes assessed and collected were void and uncon-

stitutional because abridging appellant's rights to freedom of press and freedom of worship. . . . " (p. 6.)

To the contrary, the complaint charges merely:

> ". . . abridgement of the provisions of the California and Federal Constitutions guaranteeing freedom of *worship.*" (Rec., pp. 38-39.)*

Dist. Judge Yankwich, in his written opinion ordering judgment for defendants, so read the complaint. He said:

> "The complaint asserts that the tax on the literature,—books and pamphlets,—of the plaintiff of the assessed value of $5,220.00 is a tax on its freedom of *worship* and violative of the guaranties of the first amendment." (Ib., p. 25.)

And, again,

> "In short, we take it to be the law that the guaranty of free *worship* does not prevent the taxation

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*The court may notice that paragraph XIX of the complaint, quoting the grounds of objection by the written protest accompanying the tax payment included a recital that "the enforced collection of the taxes by the collector is an exaction, enforcement and construction of the statute which makes the taxation statutes invalid and unconstitutional as construed and applied in this case for the reason that the rights of this society to freedom of press and of worship of Almighty God are hereby denied . . . " (Ib. p. 13.)

That recital, as plaintiff's counsel has conceded however, does not raise the issue of freedom of the press. He stipulated upon the trial that " . . . paragraph XIX is a mere recital of the statement of the letter accompanying the tax, stating that the tax was being paid under protest, and that the taxes were unconstitutional and an abridgement of plaintiff's right of *freedom of worship.*" (Ib. p. 59.)

Similarly, as to the recital of paragraph XXI of the complaint, that a controversy between the parties existed as to the tax and the statute authorizing the tax as abridging plaintiff's freedom of press and of worship, (Ib. p. 14) plaintiff stipulated that "the defendants have denied paragraph XXI which is really a legal conclusion. That is, we have alleged in paragraph XXI that a bona fide controversy exists before the Court for determination." (Ib. p. 60.) And, as we have noticed, the Court's finding was limited to declaration that the controversy was as to asserted abridgement of the freedom of worship.

> as property of goods and things, be they books or not, while they are in storage and waiting to be distributed or used by members of a religious group.

A tax refund suit is limited by the written protest and may be based only on the grounds therein stated. The protest is the jurisdictional basis of the suit. Such is the specific provision of the controlling statute.

> "The protest shall be in writing specifying (a) whether the whole assessment is claimed to be void or if only a part, what portion; (b) the *grounds* on which the claim is founded." (R. & T. Code 5137.)

Section 5139 specifically declares that

> "The action may be brought only . . .
> (b) on *the grounds* specified in the protest . . ."

Such limitation has recently been declared in the case of *Richfield Oil Co. v. State Board of Equalization,* 329 U. S. 69, 91 L. Ed. 80, where this Court said:

> "The claim thus frames and restricts the issues for the litigation. . . ." (p. 87.)

Petitioner's argument that "The First Amendment safeguards liberty of circulation as well as liberty of publication" (ib. p. 16) even if question of freedom of the press were involved is quite inapplicable. The tax was not upon any act of "publication" or circulation.

The Decision of the Circuit Court Neither Imperils Nor Calls in Question Religious or Other Tax Exemption Granted by the State.

Division 1 of the petition, under "Reasons Relief on For Granting the Writ", presents the contention that the decision imperils tax exemptions granted by the States, (Pet. p. 9) and denies to the States the power to grant tax exemption to religious institutions. The petition says:

> "If it is unconstitutional to afford exemption from taxation because such would be aiding a religious group by the state in violation of the separation of church and state doctrine . . . then hundreds of thousands of churches in this country have suspended over them a sword of Damocles . . ." (p. 9.)

And, again, on the same page:

> "Not only are the legislative and constitutional policy of all the states and the District of Columbia imperiled by the doctrine of the decision below but also the welfare of all the churches is affected and imperiled. . . ." (p. 9.)

This is mere misreading of the decision and entire misconception of its effect. Tax exemption, of course, is matter of state law (e. g. in California Constitution Art. XIII, Sec. 1½; R. & T. Code, Sec. 254, 256, 260). No question of exemption granted or withheld by state law is herein involved. The First Amendment does not grant exemption from a non-discriminatory general

property tax merely because a property subject to such tax is stored literature. The opinion suggests no least doubt of the right of a State, in constitution or statute, to exempt property from taxation. What the opinion commented was that if the *judicial department* were to excuse one religious group from a general non-discriminatory tax (and independent of Constitutional or legislative grant of exemption to those in such class) it would be "arguable" that it aided such one special group to spread its faith. The decision does not touch and cannot affect tax exemption granted by state law.

The First Amendment Guaranteeing Freedom of Religious Worship and of the Press Guarantees Freedom of Thought and Action. It Does Not Grant Exemption From Non-Discriminatory Property Taxation.

Division II of the petition, under "Reasons Relied on for Granting the Writ", presents the contention that things used in religious worship are exempt from taxation, in analogy to things in foreign commerce under the import-export clause.

Therein the petition quite misapprehends the scope of the protection assured by the Bill of Rights. Its protection is protection of the specified personal rights to do and to think and to act, protection of personal rights, not protection of property.

The guaranties by the First Amendment of freedom of religious worship and of speech and of the press are assurance of freedom of action, not exemption from

equalized and non-discriminatory property taxation. The petition merely assumes that under the Bill of Rights Watchtower's tracts and other printed matter are tax exempt and then argues that the mere storage thereof does not "forfeit" the assumed exemption.

Petitioner's objection to the tax is clearly mistaken in two particulars:

(1) The Constitution assures freedom of action in the specified realms, of speech, press and worship, and assembly and petition, but not in the realm of property or of property ownership free from taxation.

(2) The tax herein was not a tax or a levy upon any action or activity or burden upon any of the specified freedoms. The Constitution does assure the ownership of property under the due process and equal protection and the just compensation clauses, but it has never been thought that the First Amendment freed private property from equalized non-discriminatory taxation.

The freedoms of speech and of the press and of worship are personal rights and liberties in the three named spheres (1) of speaking, and (2) of writing, and printing and publishing and circulating, and (3) of worshipping.

Any tax attempted as a condition of or prerequisite to the exercise of such freedom or right to do or to act would infringe. The guaranty is not a guaranty with regard to property or property ownership—not even

with regard to property used or to be used in the exercise of or in connection with the guaranteed activity. The brief is quite confused in its idea that "things used which are necessary to the enjoyment of the rights guaranteed by the first amendment are as strongly protected from taxation as are things which move in foreign commerce protected against taxation by the import-export clause of the Constitution." (Pet., p. 11.) The property moving in commerce is itself the subject of commerce. That property is what is protected. The printed matter in storage (or even a hymn book or Bible used in worship) are not the subject of the assurance—instead, the right or freedom to worship is what is protected.

The Decisions Which Have Invalidated License Taxes on Religious Preaching or on Circulating Religious Literature Do Not Apply to a Non-Discriminatory Tax on Stored Printed Matter.

Division III of the petition, under "Reasons Relied on for Granting the Writ", contends that the decisions of this Court invalidating license taxes imposed upon the acts of preaching or circulating literature here apply and assure petitioner of tax exemption for the stored printed matter. Such disapproved ordinance or exaction was a restrictive limitation upon the activity and on the freedom of religious worship and of speech. Such freedoms of thought and action are not infringed by non-discriminatory taxation of property, even though the property is employed in the protected

activities. A tax upon the stored printer matters is not a tax upon any act of worship or of printing or of publishing. Yet the brief asserts that

> "The taxing of any step in the process of printing, publishing and distributing literature is an unconstitutional abridgement of freedom of press." (Pet. pp. 16-17.)

Freedom to print or immunity for "the process of printing" embrace neither the machinery nor the materials used in printing, nor later, the printed product.

The Decision is Not Based on Any Doctrine of Separation of Church and State and Does Not Withdraw a Tax Exemption Erroneously Ascribed to the First Amendment.

Division IV of the petition, under "Reasons Relied on for Granting the Writ", says that the decision by the Circuit Court of Appeals withdraws from petitioner tax exemption under the First Amendment because the doctrine of "separation of Church and State" forbids aid to one of the religious groups to spread their faith.

The opinion makes no declaration as to "separation of church and state". Its support of the tax was not based on the ground that "to declare the tax invalid would be to aid one of the religious groups." Instead, the opinion merely observed in passing that

> "Furthermore, it is arguable that isolating the corporation because of its religious character and requiring the state and municipality gratuitously to

> furnish it such services would be utilizing a tax 'to aid (one of the) religious groups to spread their faith.' . . ." (Rec. p. 74.)

The First Amendment neither grants tax exemptions nor concerns property.

The Questioned Tax is a Property Tax on the Stored Printed Matter—Not a License Exaction or Tax Upon An Act.

The petition at times soundly appreciates the questioned tax for what it truly is, to wit, a general ad valorem tax on all tangible personal property, including petitioner's stored religious books and pamphlets. The petition soundly observes that

> "All that is involved here is the ad valorem tax upon personal property." (Pet. p. 9.)

And, again, on the following page:

> "The issue of whether the state can tax religious literature (in storage to be distributed or to be) used by a preacher as a part of his worship is a presently existing controversy." (p. 10.)

But upon that issue so recognized, the petition then propounds the proposition that

> "The literature used in preaching the gospel of God's kingdom by Jehovah Witnesses is protected from taxation by the First Amendment." (Ib. p. 20.)

Generally, however, the petition confuses the issue.

The brief seeks to see this property tax as a tax on an act, to wit, either concurrently or in succession as a tax on printing, on publishing, on distributing, or on storing. The tax is a tax on the property, not a tax on any act or any step in the process of "printing" or "publishing" or "distributing." Petitioner may not dislocate the tax from its actual imposition upon the property, in order to affix it to an act. It does not aid petitioner to urge that

> "Freedom of the press is not confined to the mere printing of literature. It embraces also circulation. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' . . . " (Ib. p. 17.)

The tax yet is not a tax on *publication* or on *circulation.*

The brief coins a metaphor, and calls publication a "stream". It visions a "flowing stream of publication," and says that "the entire flowing stream must be kept open, pursuant to the mandate of the Bill of Rights and the Constitution of the United States." (Ib., p. 18.) Under the euphony of its metaphor, the brief asserts that the Constitution's protection "extends from that stream's source to its termination, which is the delivery of the literature to the millions of recipients thereof throughout the nation, including California." (Ib., p. 18.)

Again, in the endeavor to affix the tax to something else than to the property, the brief tries to affix it to the storing of the literature Carried on by the sweep and current of its metaphor, the brief continues:

> "Storage of the literature at the Lynwood depot by the petitioner is as much as any other act a part of the process of circulation. It is as much a part of the circulation process as is the handing of a piece of literature by one of the missionary evangelists to a person, as the evangelist moves from door to door in his assigned territory. Without a place to store literature the liberty of printing and distributing it would be of little, if any value. . . . " (Ib., p. 17.)

What was taxed was not any act, not the act of storing literature, but, instead, the mere property. The power and the right to act (to publish, to store, to circulate, to worship) continued unrestricted and entirely free.

The tax upon the stevedoring of ship cargo *was* unconstitutional taxation of a vital step or activity in foreign commerce, indeed a step and activity in the very exporting process. (*Joseph v. Carter & Weekes,* 330 U. S. 422. (Cited, Pet., p. 19.)

Non-discriminatory taxation of stored literature as personal property is by no possibility taxation of the activity of producing or distributing or storing the literature. *Petitioner must not assert that to have been taxed which was not taxed. It is not open to petitioner*

to assert taxation of the act of speaking or of printing, publishing or circulating, or of the act of worshipping when instead, the taxation was taxation of the property in storage. It is no more open to the claimant of a right to declare the incidence of a tax, contrary to the fact, than it is open to the claimant of a right to worship to determine something to be worship which by no possibility is worship. Freedom of worship does not excuse polygamy. (*Church of Jesus Christ v. United States,* 136 U. S. 1, 34 L. Ed. 478; *Reynolds v. United States,* 98 U. S. 145, 25 L. Ed. 244.)

As said by this Court in *Murdock v. Pennsylvania,* 319 U. S. 105, 87 L. Ed. 1296:

> "We do not intimate or suggest . . . that any conduct can be made a religious rite and by the zeal of the practitioner swept into the First Amendment. *Davis v. Beason,* 133 U. S. 333 denied any such claim to the practice of polygamy and bigamy. Other claims may well rise which deserve the same fate."

As Mr. Justice Black wisely cautions:

> "No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do." (*West Virginia State Board of Education v. Barnette,* 319 U. S. 624, 87 L. Ed. 1628, 1640.)

Merely asserting that a book or tract is worship cannot constitute such property an act. A book or

printed matter is not worship—not an act nor any part or step in the act of preaching, or of the process of worship. A *thing* is not the protected action. A noun is not a verb.

Clearly the freedom of speech does not free the printer from tax burdens common to all. The printer is subject to non-discriminatory taxes upon his presses and printer's supplies and materials. (*Grosjean v. American Press Co.*, 297 U. S. 233.)

The brief's consideration of *Nippert v. City of Richmond,* 327 U. S. 416, (Br., p. 27) points petitioner's confusion in the assertion that "the literature protected by the Bill of Rights against taxation is as free from the *ad valorem* taxes as is goods in interstate transit." (Pet., pp. 20-22.) Goods while in transit are exempt because in interstate commerce. Petitioner's literature at rest and in storage is not in transit, nor exempt as the act of publishing or of worshipping. The Court in the *Nippert* case says that a tax upon "some local incident" in the course of interstate commerce constitutes a tax upon the commerce itself. Petitioner seeks to see its taxed printed matter as an "incident" in worship. An "incident," of course, is a part of an act or happening. The Court in the *Nippert* case speaks of acts and incidents which "take place within the confines of the states" and "incidents occurring within each state," definitely indicating that the Court was talking about acts and happenings and not about physical property.

The exemption of property in interstate commerce does not exempt the rolling stock of the railroad. The exclusive jurisdiction of the Federal Government over interstate or foreign commerce and the assured freedom thereof from State control does not free from nondiscriminatory taxation the railroad cars or vessels or the other physical instruments of such commerce.

In *Adams Express Co. v. Ohio State Auditor,* 166 U. S. 185, 41 L. Ed. 965, the Court said:

> "Again and again has this court affirmed the proposition that no state can interfere with interstate commerce through the imposition of a tax, by whatever name called, which is in effect a tax for the privilege of transacting such commerce. And it has as often affirmed that such restriction upon the power of a state to interfere with interstate commerce does not in the least degree abridge the right of a state to tax at their full value all the instrumentalities used for such commerce." (p. 976.)

In *United States Express Co. v. Minnesota,* 223 U. S. 335, 56 L. ed. 459, the Court said:

> "The right of the state to tax property, although it is used in interstate commerce is thoroughly well settled. . . .

In *Wells Fargo & Co. v. Nevada,* 248 U. S. 165, 63 L. ed. 190, the Court said:

> " . . . consistently with the commerce clause of the Federal Constitution, the state could not tax

the privilege or act of engaging in interstate commerce but could tax the company's property within the state, although chiefly employed in such commerce. . . . " (p. 191.)

And see:

Pullman's Palace Car Co. v. Commonwealth of Pennsylvania, 141 U. S. 18, 35 L. ed. 613;

Murdock v. Pennsylvania, 319 U. S. 105, 87 L. ed. 1296;

Johnson Oil Ref. Co. v. Okla., 290 U. S. 158, 78 L. ed. 238;

Northwest Air Lines v. Minn., 322 U. S. 292, 88 L. ed. 1283;

St. Louis and S. W. Ry Co. v. Nattin, 270 U. S. 157, 72 L. ed. 830.

Breedlove v. Suttles, 302 U. S. 277, 82 L. ed. 252, upheld the validity of a Georgia statute imposing and requiring payment of a poll tax as a prerequisite to the right to register and vote, as against the contention that it was an infringement of the privileges and immunities assured by the Fourteenth Amendment and the Nineteenth Amendment. The language of the court as to the Nineteenth Amendment and the right to vote is directly applicable here. The Court discredited the very contention made by petitioner herein, saying of the constitutional amendment:

"Its purpose is not to regulate the levy or collection of taxes. The construction for which appellant contends would make the amendment a

limitation upon the power to tax. . . . " (Ib., p. 256.)

In Follette v. McCormick, 321 U. S. 573, 88 L. ed. 938, the Court pointed the error of Watchtower's claim of immunity from tax herein when it said:

> "The exemption from a license tax of a preacher who preaches or a parishioner who listens does not mean that either is free from all financial burdens of government, including taxes on income or property."

The Constitution assures certain personal liberties and privileges. Specifically, the Bill of Rights assures freedom of speech and assemblage and the freedom to print and to publish (the freedom of the press) and the freedom of worship. These assured rights are rights to act and to do, to wit, the right to speak, to communicate, to print, to publish, to assemble, to petition, to worship. Infringement thereof, can result only if some questioned act infringes such freedom to act and to do. The assurance of these personal freedoms does not extend into or touch the realm of property.

The distinction between the two types of right is basic. The assured freedoms of speech and of assemblage and the right to print and publish and to worship are not violated by uniform and non-discriminatory taxation of tangible personal property whether intended to be used or even used in their exercise.

Four possible aspects may be considered in connection with the freedoms guaranteed by the First Amendment, to wit:

(1) the assured freedom itself, i.e., the protected Act (speaking, communicating, printing, publishing or worshipping);

(2) the physical instrument or agent used in the activity of speech, press or worship (machinery, bibles, books, musical instruments);

(3) the product (book or newspaper, printed matter or record);

(4) the materials for, or the machinery or equipment used to produce, book or newspaper or the like.

The first alone of the foregoing four is the assured personal freedom and liberty, i.e., freedom as to the specified act by the Constitution as the right of a free people. The assurance does not extend to property, nor intend the release of property from non-discriminatory tax or other lawful control.

Petitioner has fallen into the error of considering and arguing about the property (to be) used in worship rather than the act of worship and the freedom to worship. It has considered its store of printed matter and other stationery rather than the right to print and to publish and to circulate (and, we submit, not even the latter is herein involved). That is to say, petitioner in considering the scope of the First Amendment has improperly considered and argued above indicated

aspects (2) and (3) of the subject the property connected with the act and not aspect (1), the protected act and the specified freedom itself.

The non-discriminatory tax upon the stored property did not violate any constitutional assurance or abridge any assured right.

Conclusion

It is respectfully submitted that the writ of certiorari prayed for in the petition herein should be denied.

Respectfully submitted,

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